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UNITED STATES DISTRICT COURT
OFFICIAL CERTIFIED TRANSCRIPT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

DONNA CURLING, ET AL.,	:	
	:	
PLAINTIFFS,	:	
vs.	:	DOCKET NUMBER
	:	1:17-CV-2989-AT
BRAD RAFFENSPERGER, ET AL.,	:	
	:	
DEFENDANTS.	:	

TRANSCRIPT OF TELEPHONE CONFERENCE PROCEEDINGS

BEFORE THE HONORABLE AMY TOTENBERG

UNITED STATES DISTRICT SENIOR JUDGE

OCTOBER 19, 2022

1:30 P.M.

MECHANICAL STENOGRAPHY OF PROCEEDINGS AND COMPUTER-AIDED

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P R O C E E D I N G S

(Atlanta, Fulton County, Georgia; October 19, 2022.)

THE COURT: Good afternoon. This is Judge Totenberg.
How are you-all?

MR. BROWN: Good afternoon, Judge.

THE COURT: Good afternoon.

MR. TYSON: Good afternoon.

THE COURT: I'm going to wait for just a minute so
that the beeps won't keep on going.

(There was a brief pause in the proceedings.)

THE COURT: All right. Mr. Palmer on my behalf sent
a letter to counsel last night to clarify the scope of the
matters the Court wished to address at this conference.

And so probably -- having just been dealing with the
AEO issues, the first most prominent one for me is trying to
get clarity from the Coalition plaintiffs regarding the scope
of what they are actually seeking in terms of the all AEO
designated Coffee County-related discovery documents, which
then later in a footnote is described in still more embracing
and larger terms.

Would either Mr. Brown or Mr. McGuire give me some
assistance in that regard?

MR. BROWN: Yes, Your Honor. This is Mr. Brown.
Mr. McGuire is on the line and may chime in to help. We
appreciate this opportunity on this motion, which is 1505, the

1 emergency motion.

2 Your Honor, our -- the effort here is to -- in filing
3 the motion was to present an efficient way for the AEO issues
4 relating to Coffee County to be addressed rather than dealing
5 with them on a piecemeal basis as they come up by having the
6 Court permit the designation of Ms. Marks as a consultant,
7 which is something that the parties have a right to do for
8 consultants by simply having them sign the protective order in
9 any event.

10 We believe that it is appropriate here generally to
11 Coffee County for many reasons. When we filed the motion, Your
12 Honor, there was a lot of activity in discovery with parties
13 and nonparties designating documents AEO really for little or
14 no reason. And there was also deposition testimony that was
15 upcoming in which the prospect of Ms. Marks being excluded from
16 the depositions because of some assertion of AEO was raised.

17 Therefore we believe that the proposed order that we
18 presented is the best definition and an appropriate definition
19 for this set of evidence that we think is appropriate for Ms.
20 Marks to be designated a consultant with respect to. And that
21 is discovery relating to discovery on voting system breach and
22 related security issues in the aftermath of the November 2020
23 election in Coffee County, Georgia, and similar attempts and
24 unauthorized access of the voting system in the other Georgia
25 counties.

1 Now, the -- the reasons for allowing Ms. Marks to
2 have the designation of a consultant are numerous. One is the
3 parties have a right to designate who they want to be a
4 consultant. And --

5 THE COURT: I don't think I have the -- do I have the
6 agreement someplace in the docket?

7 MR. BROWN: The protective order is 477.

8 THE COURT: Okay. But is there another agreement
9 besides that that you are referencing?

10 MR. BROWN: No. I may have misspoke, Your Honor. I
11 meant the protective order. I'm sorry.

12 THE COURT: Okay. All right.

13 MR. BROWN: And so the protective order leaves it to
14 the parties to designate the consultants who will execute the
15 protective order provisions. And both sides have done that.
16 And this motion is necessary because of the resistance to
17 allowing the Coalition to designate Ms. Marks as a consultant,
18 even though it would otherwise be appropriate.

19 It is extremely necessary for the Coalition to do so
20 for a group of reasons. One is that Ms. Marks really is one of
21 our key experts in that we have experts in various fields,
22 including Dr. Stark on audits, through Curling plaintiffs
23 Dr. Halderman on cybersecurity, Mr. Skoglund with respect to
24 election software.

25 Putting this together for counsel, we need someone

1 who knows about how elections work in Georgia. And for our
2 team, that is Ms. Marks. And we can't do that with the
3 proliferation of AEO-designated documents and the potential
4 that that continues. And that puts us in a real prejudice
5 compared to the defendant who, because they are the only one
6 designating AEO, their clients and everybody on their team gets
7 to see every piece of evidence in the case, including documents
8 that are put under seal that Ms. Marks cannot see.

9 And so there is real asymmetry in the ability of
10 counsel to be able to prepare the evidence necessary to try the
11 matter because of this.

12 So what we have done is we have taken two tracks.
13 The first track is in 1505. And that is as a category of
14 documents to have -- with respect to a category of documents
15 have Ms. Marks designated as a consultant.

16 And then in 1508, we fight sort of the mind-numbing
17 and extremely inefficient battle to have the State
18 appropriately designate documents as at most confidential that
19 don't deserve AEO treatment.

20 And with respect to that, part of the -- a big part
21 of the problem is that the concept of what AEO is supposed to
22 cover has been totally lost in this case. Completely. And
23 because AEO -- the designation of confidential is for documents
24 the release of which may damage the designating party. These
25 documents are at most confidential.

1 The designation of AEO is reserved for an extremely
2 narrow subset of confidential documents where the release from
3 the lawyer to the party damages the disclosing party. And in
4 the cases, the only instances you will find are properly
5 designated AEO are when it is trade secrets. Because the
6 party -- the trade secrets are intellectual property. Because
7 that is the instance in which the injury to the designating
8 party occurs when the other party knows it. Not when the
9 public knows it. That is confidential. But when the other
10 party knows it.

11 So the CEO of Pepsi doesn't get Coke's trade secret.
12 An IP or a competitor A, the party, doesn't get to see
13 competitor B's business plan because the very act of disclosing
14 it to the party the injury is complete. It doesn't matter if
15 it is designated to the plaintiff.

16 The way that the defendants are treating it and the
17 other nonparties, including for a moment Ms. Latham, are
18 designated -- are using AEO is simply some sort of designation
19 of confidential and we mean it, I guess. But it has nothing to
20 do with the purpose of AEO, which is to -- to prevent harm to
21 the designating party simply by the disclosure of it from
22 lawyer to party.

23 So none of these documents -- there has not been any
24 documents in this case that have been properly designated AEO.
25 But because we've got an army of lawyers on the other side and

1 we have limited resources, it is extremely difficult for us to
2 litigate every single long laid designated piece of AEO
3 document. We're doing it in 1508, and we can see how
4 inefficient it is both for the Court and the plaintiffs. But
5 we shouldn't have to do that when none of those documents -- I
6 mean -- and the -- so the misdesignation of AEO goes beyond
7 what the defendants have done. And that is, for example,
8 designate emails to the Washington Post as AEO. That is not
9 what we're talking about. That was illustrative of the care
10 with which the defendants designate documents. But that is not
11 really what we're talking about.

12 We're talking about all the other ones, just
13 bread-and-butter documents, discovery documents that at most
14 should be confidential. But none of them will -- the
15 defendants will not be injured by the disclosure from me to Ms.
16 Marks by any of those documents.

17 And so we're trying different approaches here. We
18 have -- we are trying as a category of Coffee County documents
19 to have those treated as such that Ms. Marks can see those.
20 They can retain their AEO designation so long as Ms. Marks is
21 allowed as a consultant to see them.

22 By doing that, it would largely moot 1508, though not
23 completely because that asks for different relief. That is for
24 the declassification of everybody, not just for Ms. Marks.

25 But for our purposes, it would for the most part moot

1 1508. So we don't have to -- and at least with respect to
2 Coffee County, we don't have to keep fighting the defendants on
3 their document by document, deposition line by deposition line
4 designation of things as AEO. We just can't do that. But this
5 would take care of that problem and not involve the Court every
6 time it comes up.

7 So that is what our motions are based on. And we
8 believe that the granting of 1505 will probably moot 1508 or
9 largely moot 1508. We will not injure the defendants in any
10 way at all.

11 And the specific evidence that is out there I can go
12 through. But we're talking about a category of Coffee County
13 documents that are now designated AEO and any others that would
14 be designated in the future.

15 Thank you, Your Honor.

16 THE COURT: So let me ask the counsel for defendants
17 this question. I don't see anywhere in the protective order
18 that gives you a veto on who the plaintiffs designate as a
19 consultant.

20 So while I have been very careful about handling of
21 genuinely confidential information in this matter, I -- at the
22 same time I see -- I do understand the grounds for -- at this
23 juncture for the Coalition's motion in terms of at least being
24 able to designate Ms. Marks as a consultant.

25 So I would like to hear from you as to why that is

1 not anticipated or would not be proper under the protective
2 order.

3 MR. TYSON: This is Bryan Tyson. I'll take a first
4 stab. Mr. Miller and others may have something to add.

5 I think this takes us back to when we first were
6 going back and forth about the protective order. We had a
7 whole, you know, set of filings and discovery disputes related
8 to the scope of the protective order.

9 And one of the key things back in July of 2019 was
10 Ms. Marks' role as having access to AEO material. And there
11 were specific requests made by the Coalition at that point kind
12 of similar to this to have Ms. Marks designated in some way
13 that would allow her to access AEO. And you specifically
14 denied that at that point.

15 I think the part I'm struggling a little bit with is
16 a couple of things: Number 1, we've obviously dealt with many
17 AEO-type issues where we had to talk about scope and what
18 parties could access. That included Dr. Halderman's report and
19 other things.

20 The other part I think from Mr. Brown's perspective
21 and what he shared is I still haven't heard exactly what it is
22 that he is saying shouldn't be designated AEO beyond the
23 documents that were still designated that way after we
24 redesignated following that initial production. Because I
25 think the other ones by Ms. Latham and other people -- I don't

1 have specific knowledge of those.

2 In terms of how we have been handling this, we are
3 obviously in an unusual situation as a state investigative body
4 and then GBI carrying out an investigation while the plaintiffs
5 have been carrying out kind of a parallel investigation through
6 discovery in this case.

7 And so our goal through designation at least as to
8 Coffee County has been to protect the integrity of that
9 investigation. And so I think that has been the effort there.

10 There were again specific things that were explained
11 in our responses to 1508 why we believe those documents should
12 remain designated as AEO. But if the Court wants to, you know,
13 grant Mr. Brown's motion and lift the designation there, I'm
14 not sure what other documents we're talking about at this point
15 beyond those specific ones and some unspecified documents from
16 Ms. Latham.

17 THE COURT: Okay. Well, I mean, there may be
18 potentially, I guess, more documents in the future. I don't
19 know that -- I don't know anything about, you know, the
20 projected length of the investigation or the scope of the
21 investigation.

22 And I guess that is why the Coalition's counsel was a
23 little bit loose in defining what AEO -- the materials that
24 he -- that they were seeking to allow Ms. Marks in a consultant
25 capacity access to and it shouldn't be designated.

1 Mr. Brown, can you give us any greater clarity as to
2 what you had thought was the scope of what you are -- the
3 specific scope of the matters that you are attempting to
4 address here?

5 MR. BROWN: Sure, Your Honor.

6 **(There was a brief pause in the proceedings.)**

7 MR. BROWN: Two responses. And I think Your Honor
8 will understand why there are two different responses.

9 What we're trying to do is to avoid the -- I
10 understand the need for some clarity for what we're asking, and
11 we understand that completely.

12 At the same time, what we want to avoid is having to
13 come back to the Court with respect to individual documents
14 each time there is an issue.

15 So the category of documents are documents related to
16 Coffee County, period, Number 1.

17 Number 2, there are specific documents that have been
18 designated as AEO that fall into that category that we think
19 clearly should -- Ms. Marks should have access to. But our
20 concern -- and I can name them. But our concern is that we
21 don't want to get relief on that only to have to run back into
22 court Friday to get relief on new stuff that is designated as
23 AEO that would fall into the same category, particularly when
24 the defendants haven't really answered Your Honor's question as
25 to why the motion shouldn't be granted apart from referencing

1 some pre- -- you know, some negotiation history that does not
2 appear in 477 itself, which is the order. And the order does
3 not support the defendants' argument. That is why they resort
4 to some prenegotiation history that led to that order.

5 The second thing, Your Honor, is that Mr. Tyson is
6 conflating the law enforcement privilege documents as AEO.
7 That is two categories, two different ideas. The law
8 enforcement privilege allows them, if it is properly invoked,
9 to keep the documents, not to give them to Bruce or -- to me or
10 to Mr. Cross or to anybody.

11 Now, they can also -- they can do both. They can
12 designate the law enforcement privilege documents as
13 confidential. I'm not aware of documents that they are calling
14 law enforcement privilege documents that they have produced to
15 us that they have designated as AEO. That would be improper I
16 would contend because the whole basis of the injury relating to
17 law enforcement privilege is not the disclosure to Ms. Marks or
18 to Donna Price or Donna Curling. It is their disclosure
19 publicly, public release.

20 And they don't -- they have never argued otherwise.
21 They have never argued or explained how the identity of a GBI
22 agent is something that if disclosed to Ms. Marks and no one
23 else will injure the defendants. They have never explained
24 that.

25 In fact, Ms. Marks and I will probably be meeting

1 with that GBI agent because they are doing their review and we
2 have reached out to offer them our assistance.

3 And so there is no explanation for why those
4 documents should be AEO or any documents should be AEO or any
5 artifacts, for that matter, should be AEO. And that is really
6 what the point is.

7 Just as an example, the State designated the
8 SullivanStrickler copy of the EMS, the one that
9 SullivanStrickler on January 7th copied down there in Coffee
10 County -- after SullivanStrickler gave it to the plaintiffs
11 without any restriction, the State in accordance with the
12 protective order designated that hard drive as confidential.
13 Not as AEO. But as confidential. We respected that. We did
14 not challenge that.

15 Then the State produces a copy of the EMS of --
16 copied as of when the State captured it in Coffee County. So
17 it is four months later in June -- five months later in June of
18 2016 {sic}. For that copy, they designated that copy as AEO.
19 But it is the same -- there is no difference between that and
20 the earlier one that is, quote, merely, close quote,
21 confidential.

22 THE COURT: Let me stop you. So if it is
23 confidential, it is confidential under the terms of the
24 protective order?

25 MR. BROWN: Yes, Your Honor.

1 THE COURT: Okay. All right.

2 MR. BROWN: Yeah. Yeah. Formally designated
3 confidential. Meaning, it can be disclosed to the parties but
4 not to people outside the litigation.

5 THE COURT: Okay.

6 MR. BROWN: Now, the -- so we have an anomaly where
7 our experts, Dr. Halderman, Mr. Skoglund, Dr. Stark, and
8 others, may review both -- they can do whatever they want with
9 those two copies of the EMS. Ms. Marks and other parties may
10 do whatever they want with the first one but are not entitled
11 to any information comparing the two, which is completely
12 anomalous and not necessary.

13 And that is just an example of where the AEO
14 designation is unfair and has sort of gotten out of hand. And
15 it is not helping -- it is not doing the State any good.

16 THE COURT: Why don't you-all -- tell me about a
17 parallel situation -- and all of you are sophisticated -- deal
18 with sophisticated corporate clients also -- where something is
19 designated as AEO in a business setting and what would be --
20 what would you anticipate would be the rules of the game as to
21 who it could be shared with -- an AEO document.

22 MR. BROWN: Well, Mr. Cross will have more experience
23 from his antitrust background probably. But in my experience,
24 the type of evidence that it pertains to is so narrow that the
25 issue doesn't come up.

1 And that the idea -- what we're dealing with here is:
2 I'm looking at an AEO document. And I'm thinking, wait a
3 minute. Didn't we also get this in response to an Open Records
4 Act request? Where that -- that sentence would never happen in
5 a commercial case because I'm looking at a business plan and
6 the litigation is over whether the defendant stole it. You
7 have a ten-page business plan or a one-page precis of a trade
8 secret. You're not talking about documents that are already in
9 the wild or that are shared by multiple people.

10 And so this -- frankly, this question doesn't come up
11 because the parties are allowed only to designate as AEO an
12 extremely narrow class of evidence that are -- people respect
13 it because they understand that, wait a minute, the lawsuit is
14 about the other party stealing or receiving or borrowing or
15 copying the very document that the lawyer has. Of course, you
16 can't give it to them because the injury would be complete upon
17 the disclosure to the party. As opposed to confidential
18 documents, where the injury is complete when it is disclosed
19 from the party to someone outside the litigation.

20 And, David, you may have a better answer to that
21 question.

22 MR. CROSS: Yes, Your Honor. This is David Cross.

23 That is generally consistent with my experience.
24 Although I will say that, you know, even in large corporate
25 cases that we handle, even when there is an AEO designation,

1 oftentimes that is not really --

2 **(Technical interference)**

3 THE COURT: It is oftentimes what? The beep
4 interfered.

5 MR. CROSS: Yeah. Sorry. It is oftentimes not
6 literally attorneys' eyes only. So what we often work out, for
7 example, in the antitrust cases that I handle is that you will
8 have in-house counsel that has access to that, but we also will
9 typically have maybe one or more business people -- senior
10 business people who are really important for advising their
11 counsel on the litigation. And so they will have access even
12 at the highest levels of attorneys' eyes only as well.

13 Sometimes we will do what is called an outside
14 counsel only designation where it literally is just the outside
15 counsel. And that is how the State is treating the AEO
16 designation here.

17 And to Bruce's point, that is extremely rare. That
18 you are talking about trade secrets. You are talking about,
19 you know, the recipe for Coke. Not the kind of stuff that
20 we're talking about and looking at here.

21 And if I could, Your Honor, just a couple of quick
22 points. One thing that I want to emphasize is obviously Ms.
23 Marks is not our client. But she is an incredibly valuable and
24 important consultant for us in particular. I mean, obviously
25 she is for Bruce as well.

1 But my clients are not as active in this space as
2 they once were. Ms. Marks is a very active activist, which I
3 don't think is a derogatory term, as others might seem to
4 think. I think activists are important on both ends of the
5 spectrum.

6 But what that does is that has given her unique
7 expertise on a wide variety of issues that we're dealing with
8 in this case from understanding the election laws,
9 understanding the equipment, understanding how the election
10 system works at a granular level, particularly at the county
11 level.

12 And so we -- I personally communicate with Ms. Marks
13 literally every day. And I do mean every day, on the weekends.
14 Because there is just so much information that we need from
15 her. And it has proven very problematic as we have tried to
16 pursue the Coffee County investigation when she does not have
17 access to the information we have. I mean, things as simple as
18 photos.

19 By that, I mean, photos that went to -- that came
20 from SullivanStrickler. And until just recently, we were able
21 to work it out with the State's counsel that they withdrew the
22 AEO designation and the confidentiality designations on that.

23 But for a long time, there was stuff that we couldn't
24 share with Ms. Marks that the press had. And we couldn't get
25 an explanation on how that could be appropriate.

1 I mean, the CISA advisory that was public was
2 designated as AEO. We couldn't get that designation withdrawn
3 when we raised it.

4 And my frustration, I guess, Your Honor -- it feels
5 like sort of the unfairness here is we asked -- right? Early
6 on, Bruce and his team asked if Ms. Marks could have access to
7 AEO and be designated as a consultant.

8 Candidly, Your Honor, I don't think we were obligated
9 to do that. To the point you have made, there is nothing in
10 the protective order that allows either side to strike another
11 expert or to say we can veto your consultant or your expert.
12 But as an abundance of caution because Ms. Marks is also a
13 client, I think they did the right thing.

14 But on the flip side, that hasn't happened. And we
15 have seen how that plays out. We now just learned that MITRE,
16 complete third party that was never disclosed to anyone, has
17 access to the unredacted version of the Halderman report. We
18 don't know what manner of consultants the State has. And we
19 have just learned that Fox News and I think other defendants in
20 the defamation litigation with Dominion -- they have the
21 Halderman report.

22 And so we're in this sort of really unfair and
23 prejudicial circumstance where our own clients, including Ms.
24 Marks, who really is an important consultant in this case,
25 can't read something that a lot of other folks have, including

1 individuals that we also know have access to the underlying --
2 folks at least affiliated with those who have access to the
3 underlying Dominion software and apparently wanted to do bad
4 things with it.

5 And so I guess just to net it out, Your Honor, I
6 don't see what legitimate basis the State has to say that we
7 can't pick our consultant, as they have; certainly as Dominion
8 did as a third party.

9 We should be able to do the same, and it is really
10 hurting our ability to prosecute our claims. And we can't do
11 that, particularly coupled with the overdesignation of AEO.

12 And it is incredibly time-intensive and costly to go
13 document by document and have all the back-and-forth with the
14 emails, even if the State acquiesces, which sometimes they do.
15 You are talking hours of time just to get there. And we really
16 shouldn't be in that position.

17 MR. TYSON: Your Honor, this is Bryan Tyson. I can
18 add kind of my -- what I have seen kind of AEOwise. I think it
19 is important to kind of go back to specifically what is in the
20 protective order. And it is for proprietary or sensitive
21 information -- it was Page 4 -- that the producing party
22 maintains as confidential in the normal course of operations
23 such that disclosure can impede legitimate operations. And
24 there is a discussion about that.

25 Back at Document 429, which was the joint discovery

1 statement on the protective order, specifically it was raised
2 plaintiffs have asserted an intent and desire to publicly
3 disclose as much information obtained in this litigation as
4 possible. And when it related to the plaintiffs' desire to
5 include Ms. Marks, Ms. Martin, and others in the category of
6 the people who could see AEO documents -- that is -- the
7 redline version was filed at 429-3 at Page 12 shows where there
8 was a disagreement there. And this Court ultimately entered an
9 order.

10 I mean, I agree that this is an unusual case in a lot
11 of ways. We're dealing with critical infrastructure in
12 election equipment. There are a lot of security issues
13 involved.

14 We have had situations even with these Coffee County
15 documents specifically where the plaintiff provided to the
16 Washington Post the documents they received from
17 SullivanStrickler before they provided them to us. And so we
18 have tried to carefully walk the line as protecting the
19 legitimate law enforcement investigation that is going on,
20 avoiding public disclosure, and following all the different
21 pieces that go with that.

22 And as Mr. Brown would tell you, we obviously
23 designated everything from the investigative file we didn't
24 think was covered by investigative privilege as AEO. First
25 just as for timeliness, when Bruce raised the issue to us that

1 he felt we had overdesignated, we went back. And his filing
2 said we removed the designation from most of those documents.

3 And so if there were particular documents that there
4 is an allegation we have overdesignated on those, we're happy
5 to go and look at that. Mr. Brown also explained Ms. Marks
6 obviously has had a lot of conversations with folks who were
7 involved in the Coffee County breach. She -- we appreciate her
8 willingness to be interviewed about that as Mr. Brown
9 referenced.

10 But I think that, again, we're trying to walk a fine
11 line here of a plaintiff and someone who is involved in a
12 different side of this investigation with the other components.
13 I mean, the fact that Ms. Marks needs access to the EMS -- I
14 don't fully understand the need there, since she is not a
15 technical expert. We have technical experts for that.

16 We're also in an unusual position where our
17 consulting expert, Mr. Persinger, was essentially unmasked
18 during this process by all the additional things that have
19 happened. So I get it. We're all in a strange place trying to
20 navigate through this. But I think this is what we're dealing
21 with when we have a parallel investigation going with the
22 plaintiffs and with the law enforcement folks in addressing
23 this issue in Coffee County.

24 THE COURT: Well, as I heard originally, the -- or
25 considered this originally when this was filed, the Coalition's

1 counsel basically made clear that they needed also Ms. Marks'
2 assistance as basically for summary judgment. It wasn't just
3 about Coffee County and that she needed to be able to look at
4 all the documents and assist them in this process. And so I
5 have also tried to tease out what else had been made -- had
6 been stamped as attorneys' eyes only.

7 But some of this, I think, you know, originally when
8 we were discussing the designation of who could get -- gain
9 access to this also was related to the Halderman report and
10 original concerns, which appear to be mostly mine. But
11 original concerns were larger early on of any disclosure of the
12 report.

13 So I don't know at this point how things evolved so
14 that Dominion's consultant created a report or that something
15 was ultimately handed over to other parties such as Fox News.
16 I have no idea. And maybe you-all do. But I don't need to go
17 into that all.

18 I will accept for purposes of this phone call
19 counsel's representation that it has occurred. That is all. I
20 don't know if it is -- ultimately, you know, somebody else may
21 tell me something different later on.

22 But for purposes of our conversation today, I will
23 accept it. And I certainly note that there is also a request
24 on the part of Dominion for me to do more and that they have
25 filed -- in the way they filed it. And I don't -- I don't

1 understand any of that necessarily.

2 But -- and I also just note finally in this
3 connection that the State -- that the board for the Secretary
4 of State's office has also requested that I declassify
5 everything basically and put that request on the docket. So I
6 don't even know what has, you know, necessarily been precisely
7 shared with all of the members of the board.

8 But that said, I do understand why counsel believes
9 that they need at least as to designate Ms. Marks for the
10 purpose of -- as a consultant. And I don't see anything still
11 under the protective order at this juncture that would preclude
12 that.

13 And I think I was very careful, and I spent
14 unfortunately a significant part of last -- the prior
15 weekend -- not this last one but the one before then, which for
16 us we had a -- we nominally had a holiday on Monday that I
17 spent a good deal of time on this case just trying to look at
18 all of the documents and think about them and also not to
19 mention the other issues that were flaring up between Mr. Cross
20 and opposing -- Ms. Latham's counsel.

21 But, you know, if there is -- to me, the real issue
22 at this juncture is as we have evolved -- as things have
23 evolved, I think that Ms. Marks should be allowed to be
24 designated as a consultant. I'm not saying she's an expert or
25 anything else. But she should be able to be designated as a

1 consultant because she clearly is that in reality. And it is
2 hobbling in the efficient presentation of this matter and
3 disputes. And I don't want to have to spend as much time as I
4 have already going through AEO stuff in the future. And that
5 is -- it doesn't make sense.

6 There may be something that comes up that is --
7 absolutely that you feel so strongly about you want to have a
8 conversation with counsel -- between counsel about and you try
9 to work that out and talk with me about it.

10 But the sort of things I was trying to look at at
11 this point doesn't -- it just doesn't really make sense. And
12 we're dancing on the head of a pin.

13 Truthfully I think some of the concerns are still
14 because obviously Ms. Marks and other plaintiffs believe that
15 it is their public mission as well to raise these issues in the
16 public sphere. And I understand that part of their role.

17 But if -- by accepting -- by agreeing to --
18 functioning as a consultant, there has to be a much -- there
19 has to be an understanding on the part of plaintiffs' counsel
20 that they have a greater responsibility for communicating, that
21 this doesn't mean that because she's -- that Ms. Marks is a
22 consultant that she has the same free range of public
23 communication about matters that might be deemed confidential.

24 So it actually in some ways puts some greater
25 responsibility on counsel's part to be really talking about

1 that with their consultant.

2 MR. BROWN: Yes, Your Honor. This is Bruce Brown,
3 Your Honor.

4 The point that it puts pressure on counsel is very
5 well taken. And it puts the responsibility on counsel to make
6 sure that notwithstanding that the documents are shared with
7 the consultant or are confidential that we have to turn very
8 sharp corners when it comes to releasing things to the public.
9 And that distinction we have always honored, and we will
10 continue to do so very carefully.

11 THE COURT: All right. I mean, I'm just saying to
12 you, you know, we could be -- instead of having disputes about
13 AEO, we could end up having very other nasty -- very nasty
14 disputes here about -- and I really want to avoid that.

15 MR. BROWN: Right.

16 THE COURT: And I completely understand that the
17 plaintiffs' view -- in the plaintiffs' view, Ms. Marks is the
18 most knowledgeable person in terms of election operations
19 nationally and in the state that they have easily available to
20 them. And I respect that expertise.

21 But there really is -- there has to be some judgment
22 applied as to just willy-nilly sending things out into the
23 digital and news stratosphere, even if they are public issues.
24 Things are going to be made public ultimately, no matter what.

25 But, you know, whether that is at a hearing, that is

1 one thing. But there are things that I -- I'm going to be --
2 you are going to have a very unhappy judge if appropriate
3 judgment is not used on an everyday basis in this connection.

4 MR. TYSON: Your Honor, this is Bryan Tyson.

5 Just to clarify, I mean, maybe we could all have an
6 agreement that at least before we release anything to the press
7 the parties have a chance to look at it. I think that may go a
8 long way. I think that is what you were saying. But I just
9 think making that explicit would be helpful.

10 THE COURT: Well, part of -- I mean, I guess anything
11 is probably too broad of a statement. That is the thing.

12 MR. TYSON: That is a good point.

13 THE COURT: That is a very broad statement. So I
14 think --

15 MR. TYSON: Third-party discovery maybe. Yeah.

16 MR. BROWN: Well, the --

17 THE COURT: Go ahead.

18 MR. BROWN: I mean, the -- this is Bruce Brown. The
19 protective order gives the State the opportunity to designate
20 as confidential information produced by third parties. Now,
21 there is a time issue in that they need to work quick. And
22 sometimes they don't. But I would think --

23 MR. TYSON: Sometimes we don't get it until after the
24 press has it. That is hard for us to designate it.

25 MR. BROWN: Right. I mean, these are documents that

1 they all are not kept by the State confidential. It is odd
2 that the State would even have the opportunity to so designate
3 them because they are documents that the person who holds them
4 has decided are not confidential. So that is the category of
5 documents that you're talking about. And with respect to that
6 category, it is unusual that the State would be able to reach
7 into the public domain and stamp as confidential documents in
8 any event. So I think the protective order handles that.

9 In terms of speaking with the press, I think that the
10 State needs to be careful what controls are made in that the
11 last time I checked their clients are also very active in the
12 press and very good at it. Mr. Sterling and the Secretary and
13 Judge Duffey have been active in public and in the press
14 discussing the Coffee County incident, the investigation, the
15 implications of the Halderman report, all of those issues.

16 And there are very few topics, if any, that Ms. Marks
17 has ever talked about in public that have not also been
18 discussed by the defendants as well.

19 THE COURT: All right.

20 MR. BROWN: That doesn't mean it is -- I mean,
21 judgment needs to be done independently of what the State does.
22 And we don't ever take the position that just because the State
23 did something that it is okay for us too. But I just point
24 that out as a -- to give some perspective on it.

25 Thank you.

1 THE COURT: All right. Here is my suggestion to you.
2 I'm not going to touch this issue about, you know, what --
3 trying to define it more at the moment. It is something
4 you-all could talk -- try to talk through some what your
5 greatest concerns are. And there are obviously lots of things
6 that the media and others publicize and investigate that may
7 come to your -- your client's attention that you want -- you
8 might want to do one thing or another with, which might, in
9 fact, you can't do.

10 But I don't -- I think I could be here a long time
11 and not be able to resolve this. So I mean, I think you really
12 have to sort of try to -- and you don't -- all don't want to be
13 talking about every document that comes to your attention.
14 You'll go crazy, and then you'll end up having disputes. And
15 then you will be having to deal with this day in and day out
16 with me.

17 So I don't think that that necessarily is a totally
18 viable solution. But you ought to have something that is a --
19 kind of some agreement as to a red light circumstance where you
20 pause and say -- and that you are -- that you'll talk about it
21 before you -- somebody rushes to publicize something.

22 But I don't know what that is at this juncture.
23 And -- and I think you need to work that out perhaps some more
24 and talk about it and caucus among yourselves.

25 For now, my only -- my main directive is that

1 counsel -- I hold counsel responsible for making this
2 designation. And that is not to be negative in any fashion
3 about your client. A talented person. But it is just simply
4 to say that it is a delicate balance here that we have. And we
5 want to -- the public has a vital interest in everything that
6 relates to elections and the operation of our system.

7 And at the same time, we have had lots of -- over the
8 last number of years, an enormous amount of -- nationwide of
9 misrepresentations and issues. So I don't want to in any way
10 encourage false information from -- also from being presented.

11 So I'm not saying anyone here is doing that in any
12 way. But -- and the State has an absolute right and obligation
13 to conduct its own investigation in a way that is effective.
14 And often that does require complete confidentiality.

15 MR. CROSS: Your Honor, this is David Cross.

16 THE COURT: But --

17 MR. CROSS: Oh, sorry.

18 THE COURT: No. That is it.

19 MR. CROSS: I was just going to say there were a
20 couple of other discrete discovery issues we wanted to raise.
21 And I don't know if this is --

22 THE COURT: That is fine. That is as much as I can
23 say about this one as it is.

24 I had a few others myself. Go ahead.

25 MR. CROSS: Do you want me to go ahead, Your Honor?

1 THE COURT: Go ahead.

2 MR. CROSS: Two discrete issues. One I think might
3 be easily dealt with, so I'll start with that.

4 One of the documents Your Honor reviewed in camera
5 and ordered produced was a report on the Coffee County
6 investigation that was opened in December of 2020. It is an
7 investigation that concerned things like public exposure of a
8 password dealing with a YouTube video and a couple of other
9 complaints.

10 That document included a number of exhibits. Your
11 Honor might recall that we came to you before the 30(b)(6) and
12 raised the issue over those exhibits. And Your Honor ordered
13 some of the exhibits produced and not others.

14 One of the ones that Your Honor withheld was what we
15 understand to be a real short declaration from Misty Hampton.
16 In the deposition, the 30(b)(6), Mr. Sterling testified that he
17 reviewed that in preparation -- the declaration he reviewed in
18 preparation for his deposition. And he spoke a little bit
19 about the content.

20 I don't know if that is confidential. So I won't
21 describe it here.

22 THE COURT: All right.

23 MR. CROSS: But as we understand it, it is very
24 short. It is a couple of sentences. And when we met and
25 conferred -- and Bryan will correct me if I'm wrong -- it

1 sounded like the State doesn't necessarily have a problem
2 disclosing that declaration to us since Mr. Sterling relied on
3 it for his testimony but since you had withheld it --

4 THE COURT: No. If he talked about it, then you
5 can -- I'll allow its disclosure on a confidential basis.

6 MR. CROSS: Okay.

7 MR. TYSON: This is Bryan Tyson. Thank you, Your
8 Honor. That resolves the issue. Mr. Cross accurately
9 characterized what we talked about. So thank you.

10 MR. CROSS: The other discovery issue was the
11 30(b)(6). One of the things we raised going into the
12 deposition maybe a week or so in advance was that we wanted to
13 make sure that Mr. Sterling would be prepared to talk about the
14 knowledge of the Secretary's office regarding the equipment
15 that had been taken from Coffee County. And we reached an
16 agreement that he would be prepared to speak on that subject.

17 When we got in, he had some insight on that subject.
18 By our measure, not much. Again, there are specific things I
19 won't raise on this call. But there were a variety of
20 particular questions we asked based on, for example, what our
21 own experts have seen on that data, what they found. He was
22 not aware of those things.

23 And when we asked him the questions, he would simply
24 acknowledge that he had no information about that. For his
25 prep, he did not speak with Mr. Persinger. As I understood --

1 and I went back to look at the testimony to confirm.

2 As I understood his testimony, he did not speak with
3 the consultant that they are -- the Secretary's office it
4 sounds like is largely relying on to examine that equipment.
5 Mr. Sterling did not speak with him in preparation for his
6 testimony specifically. He certainly has had some
7 conversations with him in the past.

8 It sounded like he may have had some conversation
9 with Mr. Persinger about the Poll Pads in particular. I wasn't
10 clear if that was for the deposition or just in the ordinary
11 course. But that was the only specific equipment that he
12 identified that he had spoken with Mr. Persinger about.

13 And so we just didn't have an opportunity to learn
14 what we think are important facts about that equipment, changes
15 to that equipment, what is on that equipment, what might not be
16 on that equipment.

17 And that is really a critical component of our case.
18 And it is important in a couple of respects. One --

19 THE COURT: Let me cut you off right now.

20 MR. CROSS: Sure.

21 THE COURT: Did you-all discuss how to proceed in
22 light of that to continue the -- I know that Mr. Sterling is
23 enormously busy at this time of year. And this was sort of a
24 drop-dead week.

25 So I would like to hear from the State's counsel what

1 do you propose to do in light of this, if he wasn't -- if
2 Mr. Sterling wasn't, in fact, prepared to address these issues?

3 MR. TYSON: Yes, Your Honor. This is Bryan Tyson.
4 So we obviously -- not surprisingly, I think we're going to
5 disagree about the scope of Mr. Sterling's preparation. The
6 information from Mr. Persinger was both work product and
7 investigative privilege.

8 Mr. Cross first asked his questions about assuming
9 certain facts is as far as I'll go about the server and about
10 the equipment. Those drew objection. David is correct that
11 Mr. Sterling -- that he didn't know the answer to some of
12 those. But that was from our perspective because it was
13 assuming facts that are not correct. And Mr. Cross and I
14 discussed we have a disagreement between our experts. Our
15 expert regarding, you know, what the situation with that
16 equipment is.

17 So from our perspective, Number 1, I think we would
18 (unintelligible) work product and investigative privilege
19 problems if we educated Mr. Sterling on work product, which I
20 don't think we have an obligation to do for a 30(b)(6) and put
21 him back up.

22 The other challenge is it is some very technical
23 things that the plaintiffs' experts are saying they have found.
24 Our expert disagrees about that. And so it almost -- and I
25 don't know what the answer is at this point.

1 But it almost seems like what Mr. Cross is
2 anticipating is either a spoliation motion alleging some sort
3 of interference with the equipment, which could be supported by
4 a declaration, or some sort of -- or another round of expert
5 reports, which I don't think anybody wants to do. But I don't
6 know otherwise how we would approach it.

7 I don't think simply restarting the 30(b)(6) of
8 Mr. Sterling, having talked to Mr. Persinger on information
9 covered by work product, is going to help us get to where we
10 need to get to the extent any of that is even relevant to the
11 claims here.

12 I know we discussed that previously. But that is
13 kind of our view on kind of where we are on those pieces of
14 equipment.

15 MR. CROSS: Your Honor, this is David. I think
16 Mr. Tyson crystallizes the dispute well. I think there is not
17 a dispute between us that Mr. Sterling did not have sort of the
18 depth of factual information about the equipment that we
19 thought he would have going in, based on the agreement that he
20 would have the Secretary's knowledge on that equipment.

21 The dispute comes over what level of information he
22 should have and they should disclose. And that comes down to
23 two arguments: Work product, investigative privilege.

24 The work product one is not an absolute bar to facts.
25 And I don't think just because they have decided to have an

1 outside consultant do this as opposed to someone who works
2 within the office where there would be no work product
3 argument -- I think that should not prohibit us from getting
4 important facts.

5 And the disagreement here really highlights why this
6 is important. Again, I won't get into the specifics. But, you
7 know, our experts can see that something was changed in -- no
8 specifics. But something was changed from the original EMS
9 server. And that is something we need to understand. It is
10 not spoliation or an interference issue. Frankly, I haven't
11 thought about it from that dimension at all.

12 It is more that we need to know if a change was made,
13 why it was made, what the implications are if it has for the
14 data that is lost when that change is made. And we can see
15 that change was made sometime this year.

16 And, you know, the other thing that I think we have
17 also conveyed to the State is Mr. Persinger himself is part of
18 the source of this. Because when our consultant went in to
19 copy the drives, Mr. Persinger shared with our consultant that
20 he had made this change at the direction of the Secretary's
21 office. And that is reflected in the emails that our
22 consultant sent him.

23 And so it is not clear to us why there now is a
24 different position on the other side. But that is the whole
25 point of the deposition -- right? -- is to have a witness,

1 whether it is Mr. Sterling or someone else, who can speak
2 knowledgeably about that equipment; what has been done with it;
3 if there wasn't a change, why are we seeing what we are seeing;
4 why did Mr. Persinger say what he said. So it is
5 understanding, you know -- even to the level of things like,
6 was malware found on it? Was that looked for? These are the
7 types of questions that Mr. Sterling couldn't really answer.

8 THE COURT: Well, is there a -- Mr. Tyson, is
9 there --

10 MR. TYSON: Yes.

11 THE COURT: Isn't there somebody in the -- at very
12 minimum in the Secretary of State's office who is the head of
13 technology who would have been involved with this who could
14 speak at least to some of their issues without affecting work
15 product -- attorney work product?

16 MR. TYSON: Your Honor, again, this is Bryan Tyson.

17 The short answer is the analysis that was done was by
18 our consulting expert in this litigation. Mr. Sterling did
19 share a lot of information about the Coffee County equipment.

20 But I think -- I talked to Mr. Persinger again
21 yesterday afternoon after Mr. Cross and I spoke yesterday
22 morning. And Mr. Persinger strongly disputes that changes were
23 made -- the specific things that have been said here regarding
24 the equipment.

25 But I think we're at a more fundamental level in some

1 ways of a disagreement between the experts. Mr. Sterling
2 testified about what the Secretary's office knew about various
3 pieces of equipment. The plaintiff has images that were
4 provided by Mr. Persinger who has worked extensively with the
5 GBI over the years on a lot of different cases.

6 And if there were specific things they need to
7 understand, they have the images and can look at that. So I
8 think we're at a difficult impasse in that the expertise
9 required here is really the forensic expertise and imaging.
10 And it really is Mr. Persinger, our consulting expert, who has
11 done that work and has now handed that to the GBI. And so I
12 don't have anybody else from the Secretary's office involved --

13 THE COURT: Are you expecting an affidavit from
14 Mr. Persinger -- to be offering one in this case?

15 MR. TYSON: Your Honor, I think we would be open to
16 that. But I think it might need to be -- Mr. Cross' expert may
17 need to say what he is alleging specifically. And then maybe
18 we could have Mr. Persinger respond specifically to that.

19 Because as of right now, it is still very general,
20 not even -- even more at a specific level than we can share on
21 this call, it is still a very general allegation with nothing
22 specific from us aside from one piece of it, which
23 Mr. Persinger strongly disagrees with based on my conversation
24 with him.

25 MR. CROSS: In the deposition, Your Honor, one of the

1 questions I asked was about a specific file. And our experts
2 can see that there are specific --

3 THE COURT: All right. Well, I don't want to go
4 into -- more into this right at this moment.

5 MR. CROSS: Right. And I wasn't going to get into
6 specifics. But there is specificity that we have provided. We
7 can provide more, if it is needed.

8 THE COURT: Well, one way of doing this is for -- it
9 seems to me is that you delineate the question that you have,
10 what you have seen, what is -- and -- what the specific
11 question is or what the observation is and what -- and ask and
12 see. And then the State with its expert should be able to
13 respond.

14 And if there is something that they can't -- say they
15 won't respond to, then you can come back to me and we can all
16 discuss is it really work product or is it really, in fact,
17 facts that need to be -- share facts.

18 But not -- you know, I think that would be the most
19 straightforward way, it seems to me, of proceeding right now.
20 And maybe there is --

21 MR. CROSS: That is fine, Your Honor.

22 THE COURT: Okay.

23 MR. CROSS: We can do that. The only thing I will
24 say is that there are specific questions that we can come back
25 to in the transcript to the extent we need to crystallize --

1 THE COURT: Well, you can reference that in your
2 question. It was discussed at whatever the page is. And then
3 present the question again or the discussion again.

4 MR. CROSS: We'll do that.

5 THE COURT: And then --

6 MR. CROSS: I definitely -- oh, go ahead. I'm sorry.

7 THE COURT: And I don't know how much time -- you
8 know, when you will be able to get that to the -- to counsel
9 for the defendants.

10 But I assume you could do that in the next week.

11 MR. CROSS: I think we can probably do that this
12 week. I need to ask -- check with our experts. Certainly no
13 later than Monday, if the State could respond -- if a week
14 would be fair.

15 THE COURT: I would think so because it is --
16 obviously it is not apparently going to be Mr. Sterling who is
17 doing the response, so --

18 MR. TYSON: Your Honor, this is Bryan Tyson. I think
19 the answer is a week makes sense. The only thing is I need to
20 check with Mr. Persinger.

21 Sometimes he will be testifying at trials on forensic
22 issues that may interfere with his schedule. But barring that,
23 which I don't believe he has any coming up, I think a week
24 should be sufficient for us to respond.

25 THE COURT: Okay.

1 All right. Was there something else?

2 MR. CROSS: The only other two issues that I was just
3 going to present quickly to Your Honor -- I know Your Honor
4 does not want to address unsealing of the Halderman or MITRE
5 report. I'm not going to get into that.

6 I did want to flag one issue, which we raised in our
7 brief in response to the Dominion filing, which is we do have
8 an ongoing concern with the fact that the Halderman report was
9 shared with MITRE.

10 And one of the things we have asked is that we get a
11 complete disclosure from Dominion on who all they shared it
12 with and what has been done with it.

13 One of the reasons we have a concern about that is
14 the MITRE report itself, as I recall -- and I just tried to
15 pull it up. But I don't have it in front of me. But I think
16 the MITRE report itself says on it for like public disclosure
17 or language to that effect. But it quotes extensively from the
18 sealed report.

19 THE COURT: I know.

20 MR. CROSS: So we did want to come back to that.
21 Because I didn't want to have that request just kind of get
22 lost as Your Honor was sort of suspending dealing with the
23 broader issue.

24 Because we do think all the parties and the Court
25 need to understand who all has this report. And we have

1 learned, like I said before, that one or more of the defendants
2 in the defamation litigation got it pursuant to court order
3 there. We just recently learned that.

4 So it would be nice if we could get some directive
5 for Dominion to provide. As the State has explained before, my
6 understanding is Dominion is the State's agent. So maybe that
7 is a way to get at it.

8 But we do think we need a full disclosure of who all
9 has this report.

10 THE COURT: Mr. Tyson, do you have any objection to
11 that? I mean, Dominion was given it as your agent. And I
12 don't know why they felt free to move on to the next step.

13 But that is -- I think at least we ought to know from
14 Dominion who they provided it to.

15 MR. TYSON: Your Honor, the information about the
16 defamation case is something I'm learning as Mr. Cross is
17 saying it. I wasn't aware of that.

18 I'm happy to ask Mr. Maguire or others from
19 Dominion -- and I don't know why they wouldn't be willing to
20 provide that. But I am happy to make that request certainly.

21 THE COURT: Okay. I mean, the problem is, of course,
22 Dominion is not a party here. And they made a request. And,
23 you know, I've already made my decision clear on this.

24 And I hope that, Mr. Tyson, when you talk with -- I
25 mean, Dominion is still under contract with the State. And I

1 well understand that they have a vital interest in this.

2 But the election and any runoffs are not so far away.
3 And their lawsuit and whatever the trial will be in the
4 Dominion litigation, it is also -- it will be after the
5 election. So I just -- I don't know why they felt that liberty
6 to do this.

7 But that is -- I would be very appreciative if you
8 would share with them my strong concern as well. I would like
9 to know who they gave it to --

10 MR. TYSON: Certainly, Your Honor.

11 THE COURT: -- and what the provisions were. The
12 State --

13 MR. TYSON: Yes, Your Honor.

14 THE COURT: If the case -- the court handling the
15 defamation case has ordered it and authorized it, that is --
16 then we ought to know what the scope of that authorization was.

17 MR. TYSON: Certainly, Your Honor. We'll pass that
18 along with your sentiments and comments exactly.

19 THE COURT: All right. Because we've had all of this
20 going on, I would like to understand where we are on our
21 schedule, which is being as usual shredded to pieces.

22 But as a preliminary matter, is everything basically
23 resolved in the Curling plaintiffs' interactions with
24 Ms. Latham's counsel? Have you gotten everything you wanted to
25 get?

1 MR. CROSS: Your Honor, this is David Cross.

2 THE COURT: Yes.

3 MR. CROSS: Unfortunately, no. We are trying really
4 hard not to come back to the Court on that. We tend to have
5 really cordial and productive phone calls. And then we get
6 follow-up emails that say we are not getting what was agreed.
7 So we're trying to work our way through that.

8 We're going to give it one more go, and we'll be back
9 to the Court if we need to.

10 THE COURT: Other than the matters we have discussed
11 today, is there anything else that is outstanding?

12 MR. BROWN: Your Honor, this is Bruce Brown.

13 THE COURT: Can you speak up again, Mr. Brown? You
14 got --

15 MR. BROWN: Yes. Is that better?

16 THE COURT: Much better.

17 MR. BROWN: Hello?

18 THE COURT: Yes. We hear you now.

19 MR. BROWN: Okay. Thanks. Sorry about that.

20 From our perspective, certainly in terms of the
21 schedule and the deadline for motions for summary judgment, we
22 are comfortable with a hard date, which is, say, mid-November
23 and the reason -- rather than it being continued to be pushed
24 off with efforts to clean up the discovery that we are trying
25 to get resolved.

1 Because if the summary judgment deadline keeps on
2 getting pushed off by our efforts to, for example, personally
3 serve Scott Hall, then we're not going to have summary
4 judgment. We'll never get a schedule.

5 So we're comfortable with the summary judgment
6 deadline. And we'll work as best as we can to complete the
7 discovery that was initiated within Your Honor's initial Coffee
8 County discovery exception.

9 And we're, frankly, having difficulty tagging some of
10 those people. We have a -- but we're not seeking any relief
11 from you with respect to those issues. And we'll continue
12 doing our best to try to capture that evidence.

13 THE COURT: So when you say mid --

14 MR. TYSON: Your Honor, this is Bryan Tyson.

15 THE COURT: Go ahead, Mr. Tyson.

16 MR. TYSON: I'm sorry. I just want to make sure I
17 understood what Mr. Brown was saying. My understanding was
18 there is still like a motion to compel pending in Florida about
19 Mr. Maggio or Mr. Logan. I can't remember which one is there.

20 And it sounded like he was saying we would keep
21 completing discovery while we're briefing summary judgment. I
22 just -- I've been trying to figure out how that would exactly
23 work if we're briefing summary judgment when they get
24 additional documents in from somebody and how we would deal
25 with that.

1 (Unintelligible cross-talk)

2 MR. TYSON: I agree that I want it to be sooner
3 rather than later. But that is all.

4 MR. BROWN: I mean -- yes. Specifically, we do have
5 a motion pending in the Middle District of Florida in front
6 Judge Jung compelling Mr. Logan to produce documents. That is
7 the Cyber Ninja founder Doug Logan. And we're continuing to
8 try to tag Cruce, C-R-U-C-E, and Lenberg with subpoenas for
9 their deposition testimony.

10 In terms of straggling evidence coming in, that's
11 covered by Rule 56(f) -- or maybe it is now (g). It got
12 renumbered -- dealing with a party's inability to respond to a
13 motion for summary judgment because they can't get an affidavit
14 from somebody. So I think the rules are flexible and pragmatic
15 enough to cover late-arriving evidence.

16 And I don't think we're talking about any evidence
17 that the State is seeking, for example. I don't think they are
18 doing any discovery right now. So it is just limited to our
19 ability to support or to support either filing or responding to
20 a motion for summary judgment. And our judgment is that it is
21 better to go ahead and keep -- you know, put a schedule in
22 place, put a stake in the ground and keep moving.

23 THE COURT: When you said November -- mid-November,
24 you are saying is that -- you are saying that would be the due
25 date for the State -- the defendants' motion or --

1 MR. BROWN: Mr. Cross, I'll let you speak to that.
2 But I would think it would be either side.

3 THE COURT: Well, obviously if you are all filing a
4 motion for summary judgment. But you are all the ones who
5 wanted to just have a trial.

6 All right. So I don't -- you know, I don't know that
7 there's cross-motions at issue here. But whatever.

8 Is that -- the date for anyone moving for summary
9 judgment would be November -- mid-November? Is that what you
10 are proposing?

11 MR. BROWN: Yes, Your Honor.

12 MR. CROSS: That is fine with Curling, Your Honor.

13 MR. TYSON: Your Honor, this is Bryan Tyson for the
14 State defendants. Normally I would say that is fine, and I
15 want to have summary judgment sooner rather than later.

16 My only hesitancy is we have a track record of an
17 election on November 8th with a lot of litigation in a very
18 short period of time and especially if we have a four-week
19 runoff like we do now. My only hesitancy is taking that when
20 essentially we're just wrapping up the discovery that we had
21 talked about 45 days until summary judgment motions.

22 I guess my other concern with Mr. Brown's kind of
23 proposal under 56(d) as in dog is that kind of resolution as if
24 the non-movant says I can't get evidence the resolutions and
25 the rule are the court can defer consideration, allow time to

1 get evidence, or issue other appropriate orders, which I felt
2 like we were kind of doing that already. So I just wouldn't
3 want to get us in a situation where we end up with further
4 delays under the circumstances.

5 So my thought is, you know, late November, early
6 December might be a better timeline to stick to, the 45 days we
7 had discussed. And that gets us through at least the initial
8 kind of post election, if anything happens. And we hope
9 nothing does. But we are hoping for that.

10 THE COURT: Yeah.

11 MR. CROSS: Your Honor, this is David Cross. I hate
12 to throw a wrench in the works here. I have a four-week trial
13 starting November 28th. So getting a brief late November from
14 the other side or December would be pretty tough.

15 THE COURT: You have a four-week trial? Is that what
16 you said?

17 MR. CROSS: I do, Your Honor. The judge may cut it
18 down to three, but it is going to be a multi-week trial.

19 THE COURT: I'm just looking at the schedule because
20 that is the day after Thanksgiving.

21 MR. CROSS: Right. Exactly right. That's what our
22 client said when we told them.

23 THE COURT: And running up to -- the fourth week
24 would be the week culminating in New Year's Eve.

25 MR. CROSS: Right. That is exactly right. Yeah. My

1 hope is it is going to be more like two to three weeks. But
2 the ask right now from the parties, I think, is four weeks.

3 But in any event, I understand Mr. Tyson's concerns
4 that, you know, we got really close to summary judgment filing
5 earlier this spring. There has obviously been a lot of new
6 developments. But we're -- you know, that would give them a
7 full month if we were in mid November to --

8 THE COURT: Well, the problem really is it is hard to
9 imagine there won't be some litigation. I'm just being
10 realistic. What the nature of it is I don't know. But that is
11 the way of the world these days.

12 And the election is the 1st?

13 MR. TYSON: November 8th, Your Honor, and the runoff
14 would be on December the 6th, if a runoff is necessary, which
15 I'm afraid looks likely from the polling at the moment.

16 THE COURT: Yeah. I think not knowing whether it is
17 realistic that the plaintiffs are actually going to be filing
18 their own motion for summary judgment and I'm not going to -- I
19 have no idea.

20 But are you saying then -- are defendants wanting --
21 did you say the 5th, the 12th? What are you saying then?
22 Because obviously the -- with the election being the 8th, that
23 basically takes you into the end of December -- I mean, to the
24 week of the 5th.

25 But, of course, I mean, much of it would probably be

1 resolved in the first two or three weeks before Thanksgiving.

2 MR. TYSON: Yes, Your Honor.

3 THE COURT: That doesn't take care of -- I realize
4 you could have a runoff in the senate race. Such is life.

5 MR. TYSON: Certainly, Your Honor. This is Bryan
6 Tyson.

7 I guess the thing -- I guess my thought is I feel
8 like we're kind of talking about two different things at the
9 moment. We obviously have the election schedule to contend
10 with. But I appreciate (unintelligible) Your Honor. I think
11 there is no way to avoid litigation unless maybe there's a
12 blowout election, which I don't think happens any more in
13 Georgia.

14 But I think the other thing is: If we still have
15 discovery hanging out there like are we going to pick an end
16 date for whenever we're finally going to get whatever -- are we
17 going to get anything from Logan or Maggio or Hall or anybody
18 else?

19 Because I am just anticipating if we pick, like, say
20 December 5th or 12th and then the response is, oh, we haven't
21 gotten the data from Maggio and Logan and so we need to wait a
22 few more months for that, then we have kind of rushed for no
23 purpose, I guess.

24 And so I'm just trying to think through -- I don't
25 know the answer to this. I'm just trying to think through

1 logistically what makes the most sense of how to handle that.

2 MR. CROSS: Your Honor, this is David Cross. I
3 wonder if maybe the way to do it is if we just set
4 November 15th as a deadline for dispositive motions. Everybody
5 works towards that date. But if we get close and there is an
6 election issue, for example, where the State needs more time or
7 there is some sort of outstanding discovery -- I can say from
8 my group of clients I do not anticipate right now -- I mean, I
9 obviously can't entirely predict the future.

10 But I do not anticipate our response being to a
11 summary judgment motion from the State that there is more
12 discovery we need. The stuff that is outstanding, whether it
13 is Logan, Ms. Latham -- we have got some documents from her, a
14 small set. There may be more coming.

15 But I think we'll get that resolved certainly between
16 now and then since it sounds like it is really maybe only the
17 Logan piece and I think one other thing. There was something
18 else that Bruce mentioned.

19 That is not going to be a basis for us to say we
20 need -- we're not ready to respond. So if we pick the 15th,
21 everybody works towards that, whether there are circumstances
22 that arise --

23 THE COURT: All right. I don't understand --
24 frankly, I think you are being a little cagey with me.

25 If the plaintiffs are going to be filing a motion for

1 summary judgment, I need to know. I can't resolve this without
2 knowing that. I mean, if it is -- you are just -- you want to
3 be available on a high-level, which I understand, for
4 responding to one and you need a few -- then that is a
5 different thing. And I don't need to know that today. But I
6 need to know it. Because, obviously, you can't be -- if -- be
7 working on a response to the motion for summary judgment if it
8 is filed in December while you are in trial.

9 But I'm not sure what you can do, frankly, the week
10 or two before trial if it is actually a significant case
11 either.

12 So -- but it doesn't help me to resolve this if I
13 don't have any idea of whether the plaintiffs are thinking that
14 you're filing a motion also.

15 MR. CROSS: Absolutely, Your Honor. Sorry. I don't
16 mean to be cagey. We don't have a decision on that. The
17 candid question is we are thinking about it. It is something
18 that we're looking at. But I don't yet know.

19 I mean, I think as I mentioned once before in a
20 hearing, I do think we could have a compelling summary judgment
21 motion of our own. I think Your Honor could decide this in our
22 favor without a trial on the record under the summary judgment
23 standard.

24 THE COURT: But the thing is -- the point is really
25 this though. All right. You can -- I don't have to make a

1 decision at this moment. I will make a decision imminently.

2 But relative to this issue -- all of these issues, if
3 the motion, for instance, was due on Monday -- on Monday the
4 5th of December, I don't see how -- and you are not filing it,
5 then I don't see how you are damaged. And you have able extra
6 counsel.

7 So if you basically yourselves have been working all
8 of October and November, you'll be ready, even if you are in
9 trial. If you are not going to be filing a motion, you know,
10 I'm going to obviously give you some extra time through
11 January. Between the trial and the Christmas holidays, it is
12 just unrealistic. There is only so much that people can do.

13 MR. CROSS: That's fair, Your Honor. I understand
14 that. That is fair.

15 THE COURT: So you can -- I mean, I could set it that
16 way right now as the placeholder because it gives you plenty of
17 time -- I can't control when another judge is going to issue a
18 ruling on your motion. And obviously you can get the -- you
19 can write the Court and indicate what the schedule is here so
20 that they know. But --

21 MR. CROSS: My two cents, Your Honor, is I would
22 rather have a hard date. And if December 5th is the date that
23 Your Honor thinks is fair and works for the State and everyone
24 else, that is fine. We will make that work.

25 MR. BELINFANTE: Your Honor --

1 THE COURT: Is that date viable for --

2 MR. BELINFANTE: Go ahead, Your Honor. I didn't
3 realize you were still speaking. This is Josh Belinfante.

4 THE COURT: No. I just was asking: Is that viable
5 for the State?

6 MR. BELINFANTE: What I was -- if I may, Your Honor,
7 suggest -- and we have done this in other cases as well.
8 Perhaps if we had until Monday to present the Court with a
9 proposed scheduling order -- and it could be that we have
10 competing ones, and then the Court would decide. But I think
11 that would give us all time to think through the issues that
12 have been raised here.

13 THE COURT: That is fine. That is fine.

14 MR. CROSS: That is a good idea. That is a good
15 idea. Thanks, Josh.

16 THE COURT: Okay. Is there anything else that anyone
17 has on their list?

18 MR. CROSS: Not for Curling, Your Honor.

19 MR. BROWN: Not from the Coalition, Your Honor.
20 Thank you.

21 MR. TYSON: Not from the State defendants, Your
22 Honor. Thank you.

23 THE COURT: Mr. Tyson, I would request you advise --
24 basically talk with your client about the board's request that
25 they, you know, had you independently file their motion and say

1 I appreciate their concern but I haven't changed my position in
2 this regard at this time. But -- and -- but appreciate the
3 sentiment and their focus on this, but I'm not prepared to
4 change my position at this time.

5 MR. TYSON: Certainly, Your Honor, I'll definitely
6 pass that along. And thank you.

7 THE COURT: Do we have a -- can you give us a time
8 frame for also when you are going to get back to us regarding
9 the Dominion matter as to the sharing of the -- who they shared
10 the information with?

11 MR. TYSON: Yes, Your Honor. My next call after this
12 is to Mr. Maguire to try to get on that right now. So I'll try
13 to get that moving as quickly as I can.

14 THE COURT: And if there is a court order, I would
15 like you -- that you will share that as well.

16 MR. TYSON: Certainly.

17 THE COURT: Okay. Thank you very much. Good to talk
18 with you-all.

19 Take care. Be well.

20 **(The proceedings were thereby concluded at 2:54**
21 **PM.)**

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C E R T I F I C A T E

UNITED STATES OF AMERICA

NORTHERN DISTRICT OF GEORGIA

I, SHANNON R. WELCH, RMR, CRR, Official Court Reporter of the United States District Court, for the Northern District of Georgia, Atlanta Division, do hereby certify that the foregoing 55 pages constitute a true transcript of proceedings had before the said Court, held in the City of Atlanta, Georgia, in the matter therein stated.

In testimony whereof, I hereunto set my hand on this, the 20th day of October, 2022.

Shannon R. Welch

SHANNON R. WELCH, RMR, CRR
OFFICIAL COURT REPORTER
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT
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